

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

V.

EDWARD MARRERO,

Defendant.

CASE NO. 1:18-CR-518

Judge Dan Aaron Polster

OPINION AND ORDER

Before the Court is Defendant Edward Marrero’s Motion to Suppress, Doc #: 34. Marrero seeks to suppress his trial testimony in *United States v. Adam Libbey-Tipton*, Case No. 1:16-CR-236 (“*Libbey-Tipton*”). Marrero asserts that his testimony in the *Libbey-Tipton* trial is inadmissible because it violates his Fifth Amendment rights. For the following reasons, the Motion and Marrero’s request for an oral hearing on the Motion are **DENIED**.

I. Background

On August 4, 2015, law enforcement agents executed a search warrant at the home of Adam Libbey-Tipton, a friend and former roommate of Marrero. Doc #: 34, Def.'s Mot. to Suppress 2. The agents confiscated multiple computers from the home. *Id.* In searching the computers, the agents found child pornography. *Id.* Libbey-Tipton was indicted on July 27, 2016 for access with intent to view visual depictions of minors engaged in sexually explicit conduct and possession of visual depictions of minors engaged in sexually explicit conduct, in violation of 18 U.S.C. § 2252(a)(4)(B). *Libbey-Tipton*, Doc #: 1-1, Indictment 4. Libbey-Tipton's trial began on June 25, 2018. *Libbey-Tipton*, Order [non-document] (January 29, 2018).

On June 28, 2018, Edward Marrero testified for the defense in the *Libbey-Tipton* trial. Doc #: 34-1, Trial Tr. Prior to testifying, the trial court appointed an attorney to represent Marrero because of his potential criminal exposure. *Id.* at 3:6–9. Marrero’s court-appointed attorney explained to him “in great detail” the extent of his criminal exposure. *Id.* at 3:15–23. Before Marrero took the stand, the trial court addressed Marrero and his appointed counsel to confirm that counsel had spoken with Marrero regarding this potential criminal exposure:

The Court: [I]s your client desirous of testifying, or does he wish to assert his Fifth Amendment rights?

[Counsel]: He’s explained to me he desires to take the stand.

The Court: You have advised him of any and all consequences?

[Counsel]: I have your honor. He’s explained to me that there are certain subjects that he may seek taking the Fifth, but he cannot advise me right now and he cannot advise the Court that he intends on taking the Fifth at this time.

The Court: [Counsel], did you explain to your client that it doesn’t work that way? You can’t pick and choose what you wish to plead the Fifth to.

[Counsel]: I did tell him that if he did desire to take the Fifth Amendment he should do so before taking the stand, and not during.

The Court: So you heard the conversation I just had with your attorney; is that correct Mr. Marrero?

[Marrero]: Correct.

The Court: Did you understand everything we just said to each other?

[Marrero]: I did.

Id. at 4:1–23. The trial court further explained to Marrero, “I am going to advise you that you do have the right not to testify in this case, and anything you say can and will be used against you in a court of law.” *Id.* at 5:3–6. The trial court asked Marrero if he understood, and he replied, “100 percent.” *Id.* at 5:6–7. The trial court also asked Marrero, “do you understand that you cannot pick and choose which questions you want to assert your Fifth Amendment Rights?”

Id. at 5:13–15. Marrero again confirmed he understood. *Id.* The trial court asked whether Marrero had any questions before making his ultimate decision to testify and Marrero expressed some confusion, asking, “Does this mean that the right to plead the Fifth is not my decision, if I’m only allowed to do it when allowed?” *Id.* at 5:19–21. Immediately following, Marrero had an off-record discussion with his attorney, after which he stated that he understood and did not have any further questions. *Id.* at 5–6. Finally, the trial court asked, “[d]o you wish to assert your Fifth Amendment rights or do you wish to testify?” *Id.* at 6:6–7. Marrero replied, “I pick testifying today.” *Id.* at 6:8.

Libbey-Tipton’s defense counsel then called Marrero to the stand. *Id.* On direct examination, defense counsel asked Marrero whether he had taken pictures of himself in a prurient way and Marrero stated that he had. *Id.* at 15–16. Defense counsel then asked “Have you ever taken pictures of other people that were with you in a prurient way?” *Id.* at 16:12–13. Marrero answered, “I have.” *Id.* at 16:14. On cross-examination, the Government proved further:

Q: You took pictures of a sexual nature of [your ex-girlfriend] when she was under the age of 18, correct?

A: Define sexual.

Q: You took pictures of her genitalia while she was naked, correct?

A: Yes.

Q: You took pictures of your penis with her, correct?

A: Yes.

Q: You took pictures of her breasts and buttocks, correct?

A: Correct.

Id. at 23:25–24:10. Marrero believed these images were backed-up in the pyramid cupola¹ above Libbey-Tipton’s garage. *Id.* The Government showed Marrero Government’s Exhibits 31 and 32, which Marrero identified as the prurient photos he had taken of his minor ex-girlfriend.

Id. at 26–27. Marrero admitted that he knew his ex-girlfriend was underage when he took the photos. *Id.* at 28:3.

As a direct result of this testimony, on October 17, 2018, a grand jury returned a five-count Superseding Indictment, charging Marrero with four counts of the sexual exploitation of children, in violation of 18 U.S.C. § 2251(a), and one count of possession of visual depictions of a minor engaged in sexually explicit conduct, in violation of 18 U.S.C. § 2252(a)(4)(B). Doc #: 22. Marrero filed the instant Motion to Suppress (“Motion”) and request for oral hearing on the Motion on December 17, 2018. Doc #: 34. The Government filed its Response on December 31, 2018. Doc #: 36. Marrero did not file a Reply.

II. Analysis

Marrero asserts that his testimony during the *Libbey-Tipton* trial is inadmissible in the Government’s case-in-chief against him as it violates his Fifth Amendment right against self-incrimination. The Fifth Amendment provides that no person “shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. The right against self-incrimination allows a witness to avoid disclosures that the witness “reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.” *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972). If a witness “desires the protection of the privilege, he must claim it or he will not be considered to have been ‘compelled’ within the meaning of the

¹ The pyramid cupola was a metal pyramid on top of Libbey-Tipton’s garage that stored data from computers used in the home. *Libbey-Tipton*, Doc #: 93, Trial Tr. 410–418. It contained two hard drives that were confiscated by law enforcement agents during the search of Libbey-Tipton’s residence. *Id.*

Amendment.” *United States v. Monia, et al.*, 317 U.S. 424, 427 (1943). Marrero presents two arguments for why his trial testimony is inadmissible in the present case: (1) Marrero’s Fifth Amendment waiver was not knowing, intelligent, and voluntary; and (2) the trial court treated Marrero as if he were the accused, rather than a witness, when she explained his Fifth Amendment rights. The Court will address each argument in turn.

1. Knowing, Intelligent, and Voluntary Waiver of Fifth Amendment Privilege

An individual waives his Fifth Amendment rights by “voluntarily, knowingly and intelligently” making a self-incriminating disclosure to the Government. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). In determining whether a disclosure constitutes a voluntary, knowing, and intelligent waiver, “courts examine the ‘totality of the circumstances’, including the suspect’s ‘age, experience, education, background, and intelligence, and ... whether he has the capacity to understand the warnings given to him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.’” *United States v. Montgomery*, 621 F.3d 568, 573 (6th Cir. 2010) (quoting *Fare v. Michael C.*, 442 U.S. 707, 725 (1979)).

Marrero argues that his Fifth Amendment waiver was not knowing, intelligent, and voluntary because the trial court incorrectly advised Marrero that *any* testimony would amount to a complete waiver of privilege on *all* subjects. Doc #: 34, Def.’s Mot. to Suppress 5. This is simply not true. Marrero was called to testify regarding *one* subject: his knowledge of Libbey-Tipton’s possession of child pornography in the home. The child pornography located in the home included the photos that Marrero took of his underage girlfriend. “[A] witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about details.” *Mitchell v. U.S.*, 526 U.S. 314, 321 (1999). Thus, any testimony on direct that Marrero could have given would necessarily have left him subject to

answering potentially self-incriminating questions on cross-examination. Accordingly, the trial court correctly informed Marrero that *any* testimony would act as a waiver of his Fifth Amendment rights.

Marrero also argues that because he was subpoenaed as a witness to appear in court, there was an element of compulsion in his testimony. Doc #: 34, Def.'s Mot. to Suppress 5. Yet the Fifth Amendment does not protect Marrero from being subpoenaed to testify, it "prohibits only compelled testimony that is incriminating." *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt County*, 542 U.S. 177, 189 (2004). It was Marrero's responsibility to invoke the privilege the day he testified, and "an individual under compulsion to make disclosures as a witness who reveal[s] information instead of claiming the privilege los[es] the benefit of the privilege." *Garner*, 424 U.S. at 653 (citing *United States v. Kordel*, 397 U.S. 1, 7–10 (1970)). The Fifth Amendment "speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him." *United States v. Monia, et. al.*, 317 U.S. 424, 427 (1943). The trial transcript shows that Marrero voluntarily chose to testify. After ensuring Marrero did not have questions, the trial court asked him whether he wanted to assert his Fifth Amendment rights or testify and Marrero stated, "I pick testifying today." Doc #: 34-1, Trial Tr. 6:8. This statement contradicts the notion that Marrero was coerced to testify. "Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions. Accordingly, unless the record reveals some compulsion, [a witness's] incriminating testimony cannot conflict with any constitutional guarantees of the privilege." *United States v. Washington*, 431 U.S. 181, 187 (1977).

Marrero further contends that Federal Evidence Rule 608 supports his proposition that his answering questions on cross-examination does not constitute a valid waiver of privilege. This

argument overlooks the fact that Marrero voluntarily answered questions about prurient photographs he had taken on direct examination. When a witness voluntarily testifies, “[t]he privilege is waived for the matters to which the witness testifies, and the scope of the ‘waiver is determined by the scope of relevant cross-examination.’” *Mitchell v. U.S.*, 526 U.S. 314, 321 (1999) (quoting *Brown v. United States*, 356 U.S. 148, 154–155 (1958)).

Accordingly, this Court finds that Marrero did voluntarily, knowingly, and intelligently make disclosures that waived his Fifth Amendment rights.

2. “Ordinary” Witness Fifth Amendment Privilege Against Self-Incrimination

Marrero argues that the trial court incorrectly treated him as if he were the accused, rather than a witness, when she explained his Fifth Amendment rights. However, “[i]f [a defendant in a criminal case] takes the stand and testifies in his own defense[,] his credibility may be impeached and his testimony assailed *like that of any other witness*, and the breadth of his waiver is determined by the scope of relevant cross-examination.” *Brown v. United States*, 356 U.S. 148, 154–55 (1958). To be sure, “[t]arget witness status neither enlarges nor diminishes the constitutional protection against compelled self-discrimination[.]” *United States v. Washington* 431 U.S. 181, 189 (1977). Marrero’s status as a witness does not affect the application of the law to his testimony. “[I]f a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not ‘compelled’ him to incriminate himself.” *Garner v. United States*, 424 U.S. 648, 654 (1976). Tellingly, Marrero provides no support for his position that the Fifth Amendment applies differently to witnesses than to criminal defendants. None of the cases he cites stand for the proposition he asserts. Accordingly, the trial court accurately explained to Marrero his Fifth Amendment rights.

3. Oral Hearing

Although Marrero requested an oral hearing, the Court finds that a hearing is unnecessary. Marrero bears the burden of demonstrating that there are contested issues of fact that might be resolved at an oral hearing. *See United States v. Wagner*, 289 F. App'x 57, 59 (6th Cir. 2008). Marrero does not allege that his testimony in the *Libbey-Tipton* trial contains false statements or material omissions, or otherwise presents a factual dispute. Marrero argues his testimony was obtained in violation of his Fifth Amendment rights, which is a question of law, not of fact. Because Marrero does not present a contested issue of fact to be resolved, the Court finds that an oral hearing is unnecessary.

III. Conclusion

Accordingly, the Motion to Suppress, Doc #34, and Marrero's request for an oral hearing are hereby **DENIED**.

IT IS SO ORDERED.

/s/Dan Aaron Polster Jan. 23, 2019
DAN AARON POLSTER
UNITED STATES DISTRICT JUDGE